IN THE HIGH COURT OF JUDICATURE OF ANDHRAPRADESH AT HYDERABAD

HONOURABLE SRI JUSTICE SAMUDRALA GOVINDARAJULU

SECOND APPEAL No. 165 of 2000

DATE: 14.03.2013

Between:

M.Damayanthi and another

.....

Appellants
And

Bodapati Sambrajyam

.....Respondent

HONOURABLE SRI JUSTICE SAMUDRALA GOVINDARAJULU

SECOND APPEAL No.165 of 2000

JUDGMENT:

The defendant is the appellant in this second appeal. The plaintiff/respondent filed the suit for recovery of money based on Ex.A-1 registered mortgage deed dated 24.02.1979 said to have been executed by the defendant in his favour for Rs.9,000/-. Plea of the defendant is one of total denial and of forgery of Ex.A-1 by the plaintiff. According to the defendant, the plaintiff brought Ex.A-1 into existence because of certain disputes between them in a

chit fund transaction.

2) After trial, the trial Court dismissed the suit. On appeal by the plaintiff, the lower appellate Court decreed the suit. Therefore, the defendant approached this Court with second appeal.

3) The learned Judge of this Court on 16.06.2000 admitted the second appeal in view of the substantial questions of law raised in grounds of the second appeal. In the memorandum of grounds of the second appeal, it is stated that ground Nos.4 to 6 and 9 to 11 involved substantial questions of law. They are as follows:

> "4. The Court below erred in not passing a preliminary decree in form.5A Appendix-D to the C.P.C as required under Order 34 Rule 4 C.P.C and as such the decree under appeal is liable to be set aside.
> 5. The Court below erred in awarding subsequent interest at 12% per annum ignoring Order 34 Rule 11 C.P.C.
> 6. The lower appellate Court erred in not framing the point for consideration as required under Order 41 Rule 31 C.P.C covering the entire controversy between the parties viz, establishing the execution of A-1, payment of consideration and A-1 is forged are not and on this ground alone the judgment and decree of the lower appellate Court are liable to be dismissed.
> ---
> 9. The lower appellate Court should have seen that even as per the evidence of P.W-4 the said Bhavanarushi is residing with his sons and daughters at Hyderabad and there are misunderstandings between P.W-4 and his father Bhavanarushi and as such the lower appellate Court erred in drawing the presumption under Section 108 of the Evidence Act thereby placing the burden of proof wrongly upon the appellant herein on the question of

death of Bhavanarushi.

10. The lower appellate Court should have held that the document in question is not supported by consideration in view of inconsistent and self contradictory evidence P.W-1 regarding the alleged payment to the S.B.I, Tenali, the payment of the balance amount and also the purchase of stamps.

11. The lower appellate Court should have compared the disputed thumb impression of D.W-1 on Ex.A-1 with her admitted thumb impressions on record viz., her vakalat, her written statement before holding that A-1 is true and genuine in view of the specific case of the defendant is Ex.A-1 forged and concocted".

4) Ground No.4 is not tenable in the second appeal in as much as drafting of decree/preliminary decree in accordance with Form No.5A, Appendix D to C.P.C. as required under Order XXXIV Rule 4 C.P.C is a ministerial act. The moment the appeal is allowed, it is for trial Court to issue preliminary decree accordingly. In case the appellate Court's ministerial head has to do it, it is open to the aggrieved party to take steps for amending the decree in accordance with Form No. 5A before the Court.

5) Ground No.5 relating to awarding of subsequent interest at 12% p.a. by the lower appellate Court, is factually incorrect. Nowhere the lower appellate Court stated that it was awarding subsequent interest at 12% p.a. muchless either ignoring or contrary to Order XXXIV Rule 11 C.P.C.

6) Ground No.6 is also factually incorrect in as

much as sole point is framed in accordance with Order XLI Rule 31 C.P.C by the lower appellate Court to the effect that whether the plaintiff failed to establish execution of Ex.A-1 mortgage deed in his favour. It is in accordance with Order XLI Rule 31 C.P.C.

7) Ground No.9 is also untenable for the following reasons:

Admittedly there is no dispute about death of scribe and one of the attestors and their legal heirs as P.Ws 2 and 3 proved signatures of scribe and one of the attestors in Ex.A-1 mortgage deed. The defendant wanted to harp on the other attestor by name Bhavanarushi. P.W-4 is son of the said Bhavanarushi. According to P.W-4, as per information furnished to him, his father died in railway accident at Tenali. P.W-4 identified signature of his father Bhavanarushi as the other attestor in Ex.A-1. It is contended that death of Bhavanarushi is not proved. P.W-4 deposed that since 8 years he does not know whereabouts of his father. Therefore, the lower appellate Court invoked Section 108 of the Indian Evidence Act, 1872 to presume death of Bhavanarushi. It is not the defendant's case that Bhavanarushi is alive. No contra evidence is let in by the

defendant. Irrespective of proof of death of Bhavanarushi, it is proved by the plaintiff beyond any shadow of doubt that his whereabouts are not known. Therefore, the lower appellate Court rightly disregarded comment of the trial Court that the plaintiff failed to prove Ex.A-1 mortgage deed in accordance with Section 68 of the Indian Evidence Act, 1872. Conclusion of the lower appellate Court in this regard is in accordance with law. This is no substantial question at all.

8) In so far as ground No.10 is concerned, there is no inconsistency in the evidence of P.W-1 with regard to payment of Rs.1,766.70 Ps. to the defendant by way of discharging debt due by her to State Bank of India. Ex.B-1 pass book of State Bank of India, Tenali of the defendant proved remittance of the said amount in the defendant's bank account. The discrepancy pointed out by the appellant's counsel is with regard to date of remittance. According to P.W-1, the amount was paid by her to the defendant's account on the date of Ex.A-1 mortgage deed i.e., on 24.02.1979. Whereas, the above amount was remitted in the defendant's bank account as per Ex.B-1 is on 22.02.1979. The said discrepancy by no stretch of

imagination can be equated with an admission on the part of the plaintiff. The appellant's counsel before putting forth the argument that it is an admission on the part of the plaintiff is expected to know what is the difference between an admission and contradiction. This ground is also based on question of fact and is not a question of law muchless is substantial question of law.

9) Ground No.11 is wholly untenable because Courts may not undertake comparison of thumb impressions by themselves. Ex.A-1 contains thumb impressions of the executant/defendant impressed on the document and thumb impression are also in registers of the Registration Department. The defendant-appellant did not take any steps for comparison of her thumb impressions contained in Ex.A-1 with her admitted or specimen thumb impressions. Therefore, now it does not lie in the mouth of the defendant to contend as per ground No.11. It is no substantial question of law at all.

10) I find no substantial question of law in this second appeal.

11) In the result, the second appeal is dismissed with costs.

SAMUDRALA GOVINDARAJULU,J

Dt. 14th March, 2013
ksh